83-187

Office Supreme Court, U.S.
FILED
AUG 3 1983

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KONSTANTINE TSANOS AND
LITSA TSANOS,

PETITIONERS,

VS.

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FOURTH DISTRICT,
IN CASE NO. 82-1223.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT, IN CASE NO. 82-1223

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

Konstantine Tsanos and Litsa Tsanos, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Fourth District in the above entitled case.

QUESTIONS PRESENTED FOR REVIEW

PARTIES

The parties in the proceeding in the District Court of Appeal of the State of Florida, Fourth District, whose judgment is sought to be reviewed are KONSTANTINE TSANOS AND LITSA TSANOS, the petitioners and condemnees, and the DIVISION OF ADMINISTRATION, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, the respondent and condemnor in Eminent Domain.

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PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Konstantine Tsanos and Litsa Tsanos, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeal of Florida, Fourth District entered in the above entitled case.

QUESTIONS PRESENTED

1. Whether property was taken in eminent domain without due process of law by the court's denying the value of rights-of-way to highways through adjoining land to which the condemnor had acquired a right to take in a condemnation proceeding 10 years prior for the same public

project but which was limited in scope and did not include the instant land or neighboring lands which could give easy access to the highways; when:

(a) the scope of the project was expanded to include the land now in condemnation and the neighboring lands; and

(b) the owners were premitted by the prior condemnation order to retain possession and use of the total parent tract, including both parcels, until the contract award for construction; and

(c) the owners did retain actual and legal possession of both parcels until the taking of the instant parcel now in question; and retained actual and legal possession of the prior condemned property until the contract for construction was awarded 2 years after the instant condemnation when construction was actually

begun; and

(d) the owners continued to hold legal and actual rights-of-way from the highways through the prior condemned property to the instant property at the time of taking of the instant property; and

(e) the instant property was taken 2 years prior to award of the construciton contract when the court order in the prior condemnation, as stipulated in consideration for the prior taking, required that they retain the parent tract (including the instant land) until the contract award; and

(f) the considerations under which the prior condemnation was concluded (which did not include the instant land nor neighboring lands offering benefits to the instant land) were breached by the expansion

of the project and the taking of the instant land and the neighboring lands.

2. Whether under the facts in question 1, property was taken without due process of law by the court's interpreting the prior condemnation order as a taking of title with a lease back to the owners when the Florida Constitution and eminent domain laws prohibit a taking but for a public purpose.

3. Whether property was taken without due process of law by the court's enforcing the considerations of the prior condemnation against the owners but depriving the owners of the benefits therefrom including the right to retain the balance of their land with its appreciated value from proximity to the project and the benefit of acquiring right-of-way to highways through neighboring lands which were not taken until after expansion of the scope

of the project.

4. Whether property was taken without due process of law by the court's refusing to enforce an estoppel against the condemnor from depreciating the value of the instant land by the prior taking by virtue that the considerations of the prior condemnation were breached, whether by mistake of fact or otherwise, by the taking of the additional land for the expanded project and by the taking of this land 2 years prior to the award of the construction contract which was specifically forbidden in the prior condemnation order which allowed unrestricted use of the total parent tract until the award.

5. Whether any appreciated value to the land caused by the proximity of the limited project announced 10 years prior was taken without due process of law by the court's restricting land's rights-of-

way for the same project.

6. Whether property was taken without due process of law by the court's striking and refusing evidence of value of the adjoining fronting property to be used as comparable land because it was based on the income-approach.

7. Whether the court, in its rulings concerning the considerations of the prior condemnation thus depriving the benefits therefrom accruing to the owners, interpreted the Florida Constitution and eminent domain laws as capable of impairing the obligation of contract when such laws are prohibited to the states under the United States Constitution.

8. Whether property was taken without due process of law by depriving the land owners of their damages for loss of a business on adjoining property which is permitted under Florida Statute 73.071.

when said business was capable of reestablishment on the property taken but for the taking of the instant property and the 10 years' prior taking of the right to possession of the adjoining property.

9. Whether property is taken without due process of law by condemning and taking a portion of a tract of land for a project together with its rights-of-way to highways and then waiting 10 years and taking the balance at a value without the rights-of-way for the same project claiming the rights-of-way were already taken.

PARTIES

Petitioners: KONSTANTINE and LITSA TSANOS, who were the property owners, condemnees and defendants in the trial court.

Respondent: DIVISION OF ADMINISTRATION, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, who was the condemning authority and plaintiff in the trial court.

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OPINIONS BELOW

1. Judgment of the trial court, Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida in Case No. 77-3362 (See Appendix A) is unreported but recorded in the public records of Broward County, Florida; and denial of motion for new trial, timely made, which is dated May 13, 1982, is unreported.

2. Opinion of the District Court of Appeal of the State of Florida, Fourth District in Case No. 82-1223 (See Appendix B) is reported in 429 So. 2d 17 (4th D.C.A. 1983).

3. Denial of petition for rehearing by the Florida Fourth District of Appeal, Case No. 82-1223 (See Appendix C) is unreported.

4. Dismissal of petition for discretionary review by the Supreme Court

of Florida, Case No. 63,607 to the District Court of Appeal No. 82-1223 (See Appendix D) is unreported.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under Title 28 United States Code Section 1257 whereby final judgments or decrees rendered by the highest court of a state in which decision could be had may be reviewed by writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution.

The issues are whether property was taken without due process of law and whether the state courts interpreted the Florida Consitution and laws to permit impairment of contract when property is taken under eminent domain.

1. The judgment and decision of the District Court of Appeal of Florida, Fourth District, to which this petition seeks review, was dated March 2, 1983.

2. Denial of a timely petition for

rehearing to said court was dated March 29, 1983.

3. Denial of a timely petition for rehearing on discretionary review filed with the Supreme Court of Florida was dated May 5, 1983.

The dismissal of further rehearing by the Florida Supreme Court on May 5, 1983 rendered the judgment of the Florida Court of Appeal as final and as entered.

The Florida Supreme Court dismissal was on "jurisdictional grounds" citing Jenkins v. State, 385 So. 2d 1356. Said case interprets the Florida Constitution in that opinions reading in entirely "Per Curiam Affirmed" are insufficiently "expressly" stated for discretionary review by said court. As such, the Florida District Court of Appeal is the highest Florida court in which decision can be had in our instant case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fourteenth Amendment, Section One which states:

> * * * ; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

2. United States Constitution, Article I, Section 10 which states:

> No state shall * * * pass any bill of attainder, ex posto facto law, or law impairing the obligation of contracts, or grant any title of nobility.

3. Florida Constitution, Article I, Section 10 which states:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

4. Florida Constitution, Article X, Section 6, which states:

> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
>
> (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

5. Florida Statute 73.071 (set out verbatim in Appendix E) which provides, among other things, that the compensation be determined as of the date of trial or when title passes, whichever first occurs; that a jury of twelve determine solely the amount of compensation to include the value of the property sought, plus damages to a business of more than 5 years' standing, that might be damaged by the taking, located on adjoining property of the owners; and if condemnation is for a road,

the enhancement, if any, to adjoining property of the owners shall be offset against damage to the adjoining property caused by the condemnation but not against the value of the property appropriated, and if such enhancement exceeds the damage to the adjoining property there can be no recovery from the property owner for the excess.

6. Florida Statute 90.104 which states:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection if the specific ground was not apparent from the context; or
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

(2) In cases tried by a jury, a court shall conduct proceedings to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.

(3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge.

STATEMENT OF THE CASE

I. This cause came to be tried before a jury in 1982 to determine just compensation for land (Parcel 101) taken in eminent domain on June 3, 1977 (about 3.04 acres) for the public project of building a limited access highway interchange.

1. The land was part of a parent tract, about 6.20 acres, fronting the intersection of highways U.S. 27 and S.R. 84 known as Andytown and near the entrance to a toll road known as Alligator Alley connecting the west coast of Florida, from which parent tract the condemning authority had acquired a right to take possession of about 3.16 acres (Parcel 114.1-R), which fronted the highways, in 1967 for this same project. A sketch of the area of Andytown is in Appendix F.

2. The plans submitted in evidence

for the project in the 1967 condemnation did not include the back Parcel 101 nor did they include the adjoining Arvida lands, leaving a distance of about 450 feet through these lands from Parcel 101.

3. The plans submitted in the 1977 condemnation show an expanded project including the instant Parcel 101 together with the adjoining Arvida properties.

4. The project was not started until 1979 when the contract for constructing the interchange was awarded and the condemnor took possession of the fronting Parcel 114.1-R. Possession of the instant land, Parcel 101, had been taken in 1977 pursuant to the instant condemnation suit.

5. A Stipulated Order of Taking (see Appendix G) entered in the 1967 condemnation permitted the owners to retain possession and use of the total parent

tract (including both parcels) until the contract award for the project by payment of $757.96 a year rent which the owners paid until Parcel 114.1-R was taken in 1979.

6. The owners were awarded $185,000 by a jury in 1968 for the value of the fronting the highways (Parcel 114.1-R) and retained possession of same operating their business thereon until 1979 when the contract for the project was awarded.

7. The condemning authority took possession of Parcel 101 from the parent tract in 1977 contrary to the considerations of the 1967 stipulated order; and further attempted to take possession of the fronting Parcel 114.1-R in 1977 by filing a motion stating the contract was awarded. The condemnor was effectively and legally blocked from taking Parcel

114.1-R until the actual contract award in 1979.

II. Over the objections of your petitioners, the trial judge ruled:

1. That no value should be determined with access through Parcel 114.1-R because the value of Parcel 114.1-R and its access rights were taken in 1967 and could not be revisited; but only the value of a leasehold terminable at will of the construction contract award should be determined since title to Parcel 114.1-R had vested in condemnor in 1967. See the excerpt from the jury instructions in Appendix H.

2. That the income approach to value the adjoining Parcel 114.1-R to be used as comparable property adjusted for cost of necessary fill, buildings and purchase of rights-of-way through adjoining lands not taken in 1967 was denied.

See Appendix I from the transcript.

3. Although on page 32 of the transcript the court said in reference to the project proposed in 1967 as being abandoned in favor of a new project:

> They did not abandon it at that time, and the value of the property should be based on that situation.

The court insisted that the 1967 condemnation which took Parcel 114.1-R for this same project should bar value of access to the instant property. On page 18 of the transcript:

> THE COURT: I will rule that you have no access. It appears to me that the agreement said that you should have a tenancy at 750 a year which has been terminated, so you don't have any access.

And on page 223 of the transcript (in Appendix I) the court said:

> The State has a right to say that they can't go through 114 to reach the highway, which is the case as soon as they commence the improvement.

4. That the court completely misunderstood the provisions F.S. 73.071 by denying business damages. This statute provides for business damages to adjoining property (Parcel 114.1-R) because of the severence and not for damages on business located on the instant property. Such damages are included in its valuation. See Appendix J for excerpts from the transcript which also contain arguments that effect of the project should not be considered in the valuation.

5. Appendix J also contains arguments that the considerations for the 1967 taking were breached and should not be considered.

III. This cause being in eminent domain involving the taking of property by due process of law, the federal question was argued in the trial court, as were the impairment of contractual obligations

imposed by the 1967 condemnation.

However, it was not specifically pointed out that these were federal questions until the petitioners' briefs were filed with the appeals court wherein the United States Constitution as well as federal cases on these points were cited and argued.

IV. Although objections to the points of law were made at trial and argued on appeal; the Florida Court of Appeal or "any court", as well as this Supreme Court, may take notice of the fundamental errors effecting fundamental rights such as these even though such objections were not brought to the attention of the trial judge. See Florida Statute 90.104 (3) set out verbatim in this petition in Constitutional and Statutory Provisions Involved.

Petitioners cited Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970) to the appeals

court which states that fundamental error may be considered on appeal without objection in the lower court and that constitutional issues other than those constituting fundamental error are waived unless timely made.

V. The final judgment on the 1967 condemnation dated Oct. 1, 1979 is in Appendix K.

The 1967 Stipulated Order of Taking of Parcel 114.1-R is in Appendix G.

The condemnees 1977 motion to terminate possession is in Appendix L.

The order culminating therefrom dated December 1, 1977 terminating possession on June 1, 1979 is in Appendix M.

The final order dated July 3, 1979 terminated possession on Sept. 1, 1979 at the award of the construction contract; and is Appendix N.

Excerpts from the transcript in Appendix O show objections and arguments that the 1967 Stipulated Order and the taking constituted contractual obligations and considerations which would be breached unless the instant land is valued with full access; and shows the court's contrary rulings.

REASONS FOR GRANTING WRIT

1. The state courts have decided important questions of law which effect fundamental rights under the United States Constitution, which under the unique facts of this case, have not been settled by this Supreme Court but should be so settled.

2. The Florida Court of Appeal, the state court of last resort in this case, has decided this case in a way which conflicts with the following decisions of this Court and federal courts of appeals:

United States v. Virginia Electric Co., 365 U.S. 624 81 S. Ct. 784, 5 L. Ed. 2d 838 (1960)

> It would be manifestly unjust to permit a public authority to depreciate property values . . . and then to take advantage of this depression in the price it must pay for the property.

United States v. 320.0 Acres of

Land, More or Less in the County of Monroe, State of Florida, 605 F. 2d 762 (5th U.S. Ct. of App. 1979) which held:

(1) That under the "Highest and Best Use" rule, the trial judge cannot make evidentiary rulings as to comparable property which would prejudice owners. In our instant case, the judge should not have excluded testimony on the "income approach" to valuing the adjoining Parcel 114.1-R as comparable property. This value could have been presented to the jury to decide on adjustment for necessary fill, buildings and potential purchase of rights of way through other lands in existence before the expanded project. It was a jury question and the appraisal should have been admitted.

(2) That under the "Scope of Project" rule, if the project imposes restrictions which preclude property

use (such as in our instant case) these restrictions should be precluded from consideration by the jury.

(3) That under the "Scope of Project" rule if the proposed improvement is preannounced without including the property (such as in our instant case) then the owner is entitled to the enhanced value. The enhanced value is a property right which, in our instant case, was taken without compensation by the trial judge's restricting the rights-of-way taken for this same project and but for these restricted rights-of-way, the property value would have been enhanced. United States v. Fuller, 409 U.S. 488, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973) which held:

(1) That owner is entitled to location value (the interchange proposed in 1967 in our instant case).

(2) That "fairness" is just compensation under the 5th Amendment (encompassed in the 14th as to state's takings).

(3) That "just compensation" includes increased value resulting from the completed project to lands originally outside the project limits.

(4) That the United States (the state in our instant case) may not be excused from paying "just compensation" measured by value at the time of taking merely because the state in which the property is located, through exercise of its lease power (in our case the exercise of its power to take the rights-of-way under the 1967 condemnation order) might have diminished that value without paying compensation.

Rodgers v. Tolson, 582 F. 2d 315 (C.A. Md. 1978)

Due process clauses of 14th

amend. requires state or its instrumentality to pay just compensation when it takes private property for public purpose.

Webbs Fabulous Pharmacies, Inc. v. Beckwith, 101 S.Ct. 446, 449 U.S. 155, 66 L. Ed. 2d 358 (1980)

5th Amend.'s prohibition against taking private property without just compensation applies against the states through 14th Amend.

United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1942)

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners

> ought not to gain by speculating on probable increase in value due to the Government's activities. 317 US, at 376-377, 87 L.Ed. at 344.
>
> In determining market value of condemned land, value is to be ascertained as of the day of Taking.

In our instant case the court deprived owners of their property right to the enhanced value by subjecting the restrictions imposed by the prior taking for this same project now enlarged.

The instant land had full legal access to the highways as of the day of Taking on June 3, 1977.

Further, the considerations for the 1967 taking were breached:

(1) Parcel 101 did not remain in the owners at the completion of the project which was a condition for the taking and the 1967 stipulation and had potential value from the proximity of the

project then proposed.

(2) Parcel 101 was taken prior to the award of the construction contract contrary to the order.

(3) Business damages were waived in consideration.

All of the above were valuable property rights taken without due process of law process of law prohibited by the United States Constitution, Fourteenth Amendment, Section One; and are valid obligations of contract imposed on the condemnor which were impaired by the lower court's decision in this case.

Further, in allowing the taking these property rights, the lower court interpreted the Florida Constitution, Article X, Section 6, providing for taking for public purpose, as well as Florida Statute 73.071, providing for payment etc. under eminent domain, as

allowing the impairment of contract, whereas the United States Constitution, Article I, Section 10 prohibits the states from passing such laws.

And further, due process of law was denied because the Florida Constitution, Article I, Section 10 also prohibits passing of laws impairing contracts which would include F.S. 73.071.

CONCLUSION

This Court is asked to review this case and determine whether the federal constitution prohibiting taking of property without due process of law and prohibiting state laws impairing contracts has been violated; and to issue its judgment and orders thereon.

Respectfully submitted,

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APPENDIX A

Judgment of the Trial Court

IN THE CIRCUIT COURT,
17TH JUDICIAL CIRCUIT,
BROWARD COUNTY, FLORIDA

CIVIL ACTION NO: 77-3362

JUDGE: FARRINGTON

DIVISION OF ADMINISTRATION
STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Plaintiff,

vs. FINAL JUDGMENT

KONSTANTINE TSANOS, et al.

Defendants. Parcel 101

_____/

THIS CAUSE came on for trial and the Jury, having been empaneled and sworn to try what compensation shall be made to the Defendants for the property rights appropriated, and having heard the evidence and charges of the Court, and having retired to consider its verdict, returned the following Verdict:

IN THE CIRCUIT COURT,
17TH JUDICIAL CIRCUIT,
BROWARD COUNTY,
FLORIDA

CIVIL ACTION NO: 77-3362
JUDGE: FARRINGTON

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Plaintiff,

vs VERDICT

KONSTANTINE TSANOS, et al.

Defendants. Parcel 101
_____/

We, the Jury, find for the Plaintiff, as follows:

FIRST: That an accurate description of the property taken herein is the following:

Section	STATE ROAD	BROWARD
#86075-2409	#93 (I-75)	COUNTY

PARCEL #101 DESCRIPTION
RIGHT OF WAY

PARCEL NO. 101 SECTION 86075-2409

All that part of the NW ¼ of the NW ¼ of the NW ¼ and the W½ of the NE ¼ of the NW ¼ of the NW ¼ and the N ½ of the SW ¼ of the NW ¼ of the NW ¼ of Section 34, Township 49 South, Range 39 E in Broward County, Florida, lying Easterly of State Road 25.

Containing 3.0409 acres, more or less.

OWNED BY: KONSTANTINE TSANOS AND LITSA TSANOS, HIS WIFE

SUBJECT TO: MORTGAGE RECORDED IN O.R. BOOK 5104 AT PAGE 12 IN FAVOR OF THE DANIA BANK AS EXECUTOR OF THE ESTATE OF ANDREW D. POULOS, DECEASED

SECOND: That the compensation to be made by the Plaintiff for the above-described parcel of land is as follows: For No. 101 described above, owned by Konstantine and Litsa Tsanos; we find the compensation to be made therefor is the sum of:

$16,000.00

So say we all, this 26 day of March, A.D. 1982 at Fort Lauderdale, Broward

County, Florida.

/s/ MICHAEL E. FUNK
FOREPERSON

IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that title to the property described above, which vested in the Plaintiff pursuant to the Order of Taking and deposit of money heretofore made, is approved, ratified, and confirmed and it is further

CONSIDERED, ORDERED AND ADJUDGED that the Clerk of the above-styled Court is hereby ordered and directed to pay from the funds deposited in the Registry of the Court by the Plaintiff, the sums so stated above to the aforementioned Defendants, less any sums heretofore withdrawn, if any.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida this 26 day of

March, 1982.

/s/ OTIS FARRINGTON

CIRCUIT JUDGE

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1983

KONSTANTINE TSANOS and
LITSA TSANOS,

Appellants,

v. CASE NO.
82-1223

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Appellee.
_____/

Decision filed March 2, 1983

Appeal from the Circuit Court for
Broward County, Otis Farrington, Judge.

Ernest A. Alexas, Fort Lauderdale,
for appellants.

Alan E. DeSerio and John H. Beck,
General Counsel of Department of
Transportation, Tallahassee, for
appellee.

PER CURIAM.
Affirmed.

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING PETITION AND, IF
FILED, DISPOSED OF.

ANSTEAD, GLICKSTEIN and
WALDEN, JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

KONSTANTINE TSANOS and LITSA TSANOS,
Appellant,

CASE NO.82-1223

v.

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,
Appellee

March 29, 1983

BY ORDER OF THE COURT:

ORDERED that Appellants' March 15, 1983 Motion for Rehearing is denied.

I hereby certify the foregoing is a
true copy of the original court order.

Clyde L. Heath
CLYDE L. HEATH,
CLERK

APPENDIX D

SUPREME COURT OF FLORIDA
Thursday, May 5, 1983

KONSTANTINE TSANOS, et al.,
Petitioners,

v. CASE NO. 63, 607

DEPARTMENT OF TRANSPORTATION, etc.,
Respondent.

_____/

District Court of Appeal,
4th District - No. 82-1223

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
ATTEST: Sid J. White, Clerk,
Supreme Court

Hon. Clyde L. Heath, Clerk
Hon. Otis Farrington, Judge
Hon. Robert E. Lockwood, Clerk

Ernest A. Alexas, Esquire
Alan E. DeSerio, Esquire

APPENDIX E

FLORIDA STATUTE 73.071

FLORIDA STATUTE 73.071 Jury Trial; compensation, severance damages

(1) When the action is at issue, and only upon notice and hearing to set the cause as soon as practical considering the reasonable necessities of the court and of the parties, and giving perference to the trial of eminient domain cases over other civil actions, and submit the issue of compensation to them for determination, which issue shall be tried in the same manner as other issues of fact are tried in the circuit courts.

(2) The amount of such compensation shall be determined as of the date of the trial, or the date upon which title passes, whichever shall occur first.

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

(a) The value of the property sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including when the action is by the Division of Road Operations[1] of the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages

to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his written defenses the nature and extent of such damages; and

(c) Where the appropriation is of property upon which a mobile home, other than a travel trailer as defined in s. 320.01, is located, whether or not the owner of the mobile home is an owner or lessee of the property involved, and the effect of the taking of the property involved requires the relocation of such mobile home, the reasonable removal or relocation expenses incurred by such mobile home owner, not to exceed the replacement value of such mobile home. The compensation paid to a mobile home owner under this paragraph shall preclude an award to a mobile home park owner for such expenses of removal or relocation. Any mobile home owner claiming the right to such removal or relocation expenses shall set forth in his written defenses the nature and extent of such expenses. This paragraph shall not apply to any governmental authority exercising its power of eminent domain when reasonable revoval or relocation expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power.

(4) When the action is by the division of road operations, county, municipality, board, district or other public body for the condemnation of a road, canal, levee or water control facility right of way, the enhancement, if any,

in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated by the petitioner, shall be offset against the damage, if any, resulting to such remaining adjoining property of the defendant property owner by reason of the construction or improvement, by such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property there shall be no recovery over against such property owner for such excess.

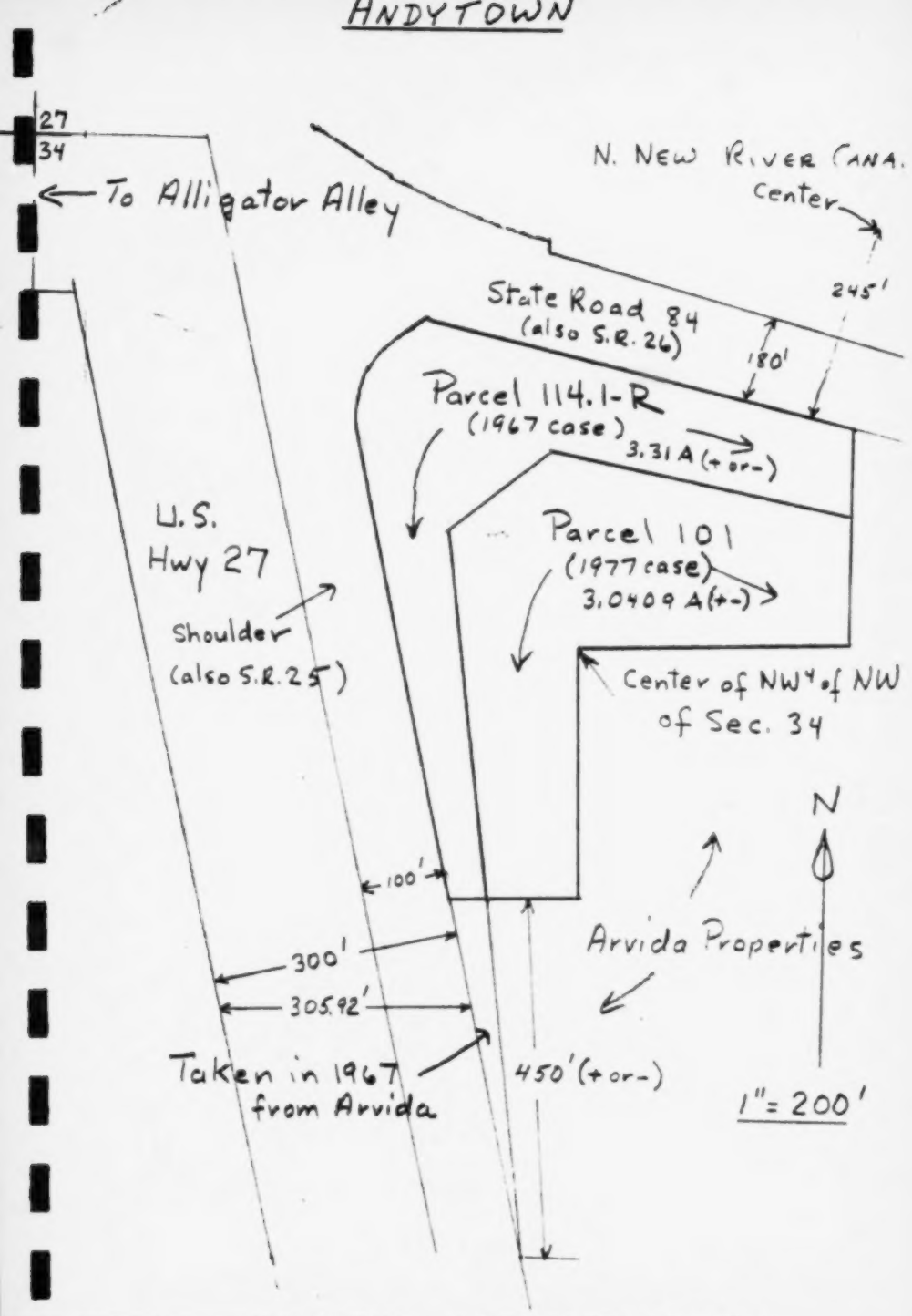
(5) The jury shall view the subject property upon demand by any party or by order of the court.

(6) If the jury cannot agree on a verdict the court shall discharge them, impanel a new jury, and proceed with the trial.

Laws 1965, c. 65-369, § 1, eff. Oct. 1, 1965. Amended by Laws 1960, c. 69-106, §§ 23, 35, eff. July 1, 1969; Laws 1970, c. 70-283, § 1, eff. Oct. 1, 1970; Laws 1977, c. 77-51, § 1, eff. May 23, 1977; Laws 1979, c. 79-400, § 19, eff. Aug. 5, 1979.

[1]See Laws 1981, c. 81-209, § 1, which reorgaized, in part, the division structure within the Department of Transportation.

ANDYTOWN



APPENDIX F

APPENDIX G

Stipulated Order of Taking in the 1967 condemnation.

IN THE CIRCUIT COURT
OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY,
FLORIDA

LAW NO. 67-848 (Warren)

BROWARD COUNTY, a
Political Subdivision
of the State of Florida,

Petitioner,

vs.

ROY C. JONES, et al.

Defendants.
_____/

STIPULATED
ORDER OF TAKING

THIS CAUSE coming on to be heard upon the Declaration of Taking and Estimate of Value heretofore filed herein by State of Florida, and upon the Motions heretofore filed by the Defendant, Andrew D. Poulos, by and through his undersigned attorneys, after due notice of all of the fore-

going to opposing parties, the aforesaid parties, together with W. A. Maier, District Right of Way Agent for the State Road Department of Florida, thereupon stipulated as follows:

That the Defendant, Andrew D. Poulos, will withdraw his Motion to Dismiss, Motion to Strike, Motion for Continuance, and Interrogatories heretofore filed herein, without prejudice to the right of the Defendant, Andrew D. Poulos, to file Interrogatories directed to the question of damages for the taking, in consideration of which the Defendant, Andrew D. Poulos, is to be allowed to remain in complete and undisturbed possession of his total parent tract from which Parcel 114. 1-R is being taken, and including said parcel, without limitation of access,

until the award of the construction contract whereby the ultimate limited access interchange at the junction of State Road 838, State Road 84, and State Road 25 (U.S. 27) will be constructed utilizing said parcel, in Broward County, Florida, such interchange being designed to interconnect the aforesaid state roads by grade separations and directional ramps. That this right to remain in possession is to be freely assignable or devisable and is not personal to the Defendant, Andrew D. Poulos.

Said parties hereto also stipulated that the Defendant, Andrew D. Poulos, his heirs and assigns, during aforesaid period of continuing possession shall pay rent at the rate of SEVEN HUNDRED

FIFTY-SEVEN DOLLARS AND NINETY-SIX CENTS ($757.96) per annum for all full years of such possession with that amount to be prorated for any partial years of possession.

It was further stipulated and agreed by and between the parties hereto that all of the foregoing is without prejudice to the Defendant, Andrew D. Poulos, contesting the amount to be awarded by reason of the taking herein.

It was further stipulated that the contents of this Stipulation and all the terms as set out herein shall not be introduced into evidence by either party to the same at any eventual jury trial herein; and the Defendant, Andrew D. Poulos, waives any claim for business damage under Section 73.071, Florida

Statutes, so that the question to be determined by the jury will include only the value of the taking, severance and moving costs.

It was further stipulated that upon and pursuant to the entry of this Stipulated Order of Taking, the Petitioner will deposit only the sum of NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY DOLLARS ($93,750.00), which is Petitioner's estimate of value.

It was further stipulated that Petitioner will furnish to the Defendant, Andrew D. Poulos, through his undersigned attorneys, copies of all right of way maps, appraisals, construction plans, and present and projected traffic count summaries within fifteen (15) days after the entry of this Order of Taking.

That upon the foregoing Stipulation and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as to Parcel 114.1-R:

1. That the Court has jurisdiction of the subject matter of this cause.

2. That the Petition and Declaration of Taking in this cause are sufficient.

3. That the Estimate of Value filed in this cause by the Petitioner was made in good faith and based upon a valid appraisal.

4. That the Petitioner will be entitled to possession of the following described property only in accordance with the foregoing Stipulation:

Parcel No. 114.1-R	Section 86001-2501	Limited Access Right of Way

That part of the NW ¼ of NW ¼ of NW ¼, W ½ of NE ¼ of NW ¼ of NW ¼ and N ½ of SW ¼ of NW ¼ of NW ¼, Section 34, Township 49 South, Range 39 East, South of State Road 84 and East of State Road 25.

Lying Westerly, Northwesterly, and Northerly of the following described line: Commence at the Northwest corner of said Section 34 thence run East along the North line of Section 34 a distance of 206.04 feet, thence South 13 degrees 22 minutes 30 seconds east along the Survey line of State Road 25 a distance of 1458.34 feet, thence North 76 degrees 37 minutes 30 seconds East 100 feet to the Point of Beginning of said line herein described, thence North 4 degrees 22 minutes 30 seconds West 934.58 feet, thence North 51 degrees 21 minutes 52 seconds East 161.89 feet, thence South 77 degrees 15 minutes 56 seconds East 400 feet to the end of said line herein described.

Containing 3.31 acres, more or less.

Together with all rights of ingress, egress, light, air and view between the Defendant's remaining property and any facility constructed on the above described property.

and that the deposit of money hereinafter specified will fully secure the persons lawfully entitled to compensation, as

will be determined ultimately by final judgment of the Court, either upon jury trial or stipulation, and which said sum of money to be deposited is the same as the value of said parcel of said land, as fixed by the estimate of value as set by the Petitioner.

PROVIDED, FURTHER, that the said sum of money in the total amount of NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY DOLLARS ($93,750.00) shall be deposited in the Registry of the Court within twenty (20) days after the date of this Order; and, upon making such deposit, the Petitioner shall notify, in writing, all attorneys of record, and those defendants not represented by counsel that the deposit has been made.

If the Peitioner shall default in

the depositing of said sum of money within the time provided, this Order shall be void and of no further force or effect.

DONE AND ORDERED in Chambers, Broward County, Florida, this 6th day of September, A. D. 1967.

JOINT MOTION

COMES NOW the Petitioner, Broward County, a political subdivision of the State of Florida, and Defendant, Andrew D. Poulos, by and through their undersigned attorneys, and move the entry of the foregoing Stipulated Order of Taking.

JAMES L. AMSDEN
Post Office Box 6537, Sta. 9
225 Harbor Beach Plaza
Fort Lauderdale, Florida

Assistant County Attorney,
Broward County, Florida

ODEL HIAASEN
McCUNE, HIAASEN, CRUM & FERRIS
Post Office Box 941
Broward National Bank Bldg.
Fort Lauderdale, FL; and

JAMES J. RICHARDSON
110 West Pensacola Street
Tallahassee, Florida

Attorneys for Defendant,
Andrew D. Poulos

STATE OF FLORIDA
BROWARD COUNTY

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of

_____

WITNESS my hand and Official Seal in the City of FORT LAUDERDALE, FLA. this 7th day of March A.D. 1973.

CLYDE L. HEATH, Clerk of Court

By_____D.C.

APPENDIX H

Excerpts from Transcript on the jury instructions denying value with access, explanation of the 1967 order, and denying appraisal with appreciation caused by the proposed project in 1967.

You are instructed not to award damages to the subject parcel as a result of its access to State Road 84 and U.S. 27 through Parcel 114 being deprived. These damages were assessed in prior litigation and cannot be revisited.

I will discuss that a little further when I explain these orders that were entered in the other case.

You are instructed that a limited access facility permits access only at designated points. A limited access taking, therefore, permits no access to the remainder property across the taken property.

Now, this brings into play the orders that were entered in the prior case which has been referred to as the 1967 case, although it continued, as to some aspects, at lease until 1979. At the time of that

case, the property, Parcel 101, which was being taken in this case, and Parcel 114 were all under the same ownership.

The Department at that time filed a declaration of taking as to Parcel 114 asking for a limited access taking, which would mean that the owner of 114, who would continue to own Parcel 101, would not have any right of access to the roadway through 114 which the Department was taking.

A declaration of taking was filed, as it was filed earlier in this case, and there was a hearing for the purpose of the State taking the property. Rather than that hearing being decided on a contested basis, the parties entered into a stipulation, which was entered into, of course, in light of the knowledge that the State had the right to condemn the property, and they entered what has been introduced into evidence as a stipulated order of taking.

It is not my province to comment on the testimony, but it is my purpose to explain to you these legal proceedings so that you will understand what the proceedings was for and what was done and the meaning of the stipulated order of taking.

At that time, they agreed that the State Department of Transportation could take the property and that Mr. Andrew D.

Poulos, who was the owner of the property at that time and through whom the Department has acquired title, would have a right to remain on the property and continue to conduct his business until such future time as the State entered into an agreement with or let a contract for construction of the roadway.

They didn't know at that time how long it would be, but it was contemplated that it would be a considerable period in the future. And they agreed that by reason of that, he would be permitted to stay on the property, at a designated lease or rental paid to the Department of Transportation, who, after that proceeding was over, owned 114 and all the building and improvements on it.

And they agreed that they would rent it to him for $750.00 a year or approximately that figure until such time as they actually let the contract which would require the use of the parcel.

And based on that, the order of taking was entered, and the property was taken subject to his right to continue to use it in connection with his remaining property until such time as the State should require it or let a contract for use for roadway purposes.

Well, a considerable period of time passed. First, I will say that at that time there was an amount that was agreed to be paid at that time, which was a deposit put in for the order of taking, that is indicated in the order. But you should not pay any attention to that. We are talking about 1967 prices, and this was not the price that was actually award-

ed by the jury.

They had a trial, just like we had here, as to what should be paid to him for the taking of that property, and the jury made the determination and the final judgment was entered on October the 1st, 1969, finally concluding the matter.

That is, they took it in 1967, just like they took this piece of property in 1977, but it was not tried by a jury and actually concluded until 1969, and the final amount that was decided by the jury as the proper full compensation.

And that amount should not be considered by you because 1967 values have little relation to 1977 values.

The final judgment in that was Plaintiff's Exhibit No. 6.

Plaintiff's Exhibit No. 7 was a motion to terminate possession. In that case, the Department of Transportation came into court on a motion, which was served on the defendants' attorneys in April, 1977, and they stated that they had notified Mr. Tsanos, who was then occupying the property as the successor in interest to the owner that had the property back in 1967 -- I believe the testimony is that he is his nephew.

And they said that they and furnished him written notice, and they asked that he vacate the property; and that on the 21st of March, 1977, therefore, asked that his right of possession be terminated. That was in April, 1977 that they filed that motion.

Shortly thereafter, a hearing was held

and an order was entered by Judge Warren, one of the judges of this Court, requiring him to vacate the property no later than June the 15th, 1977. That is Defendants' Exhibit 2.

The defendant came in and asked for a rehearing on that order, and the thrust of his motion is that he hadn't had time to determine whether a contract had been let and whether the contract that had been let actually required the use of the property, Parcel 114.

And upon a hearing, the judge entered an order vacating the prior order which required him to get out on June the 15th and entered another order which required the defendants to vacate the premises on or before 1979, based upon the State filing a good faith affidavit that it would be needed by that time. That was the last order entered, and that order required the defendants to release the premises, get off 114, by September the 1st, 1979.

That order was entered on July the 3rd, 1979.

Now, as I explained before, the order terminated their right, that is, the taking of 114 for limited access terminated their right to access to the highways, Highway 27 and 84, through 114, at such time as the State should ultimately determine that they needed the property for or let a contract for use of the property for road purposes.

Now, that hadn't been done at the time that the subject parcel was taken. That is, he was still on the property, on 114, under his prior stipulated right to remain

there until such time, and anybody who is valuing 101 would have a right to contemplate that they would continue to have access through 114 - until such time as the State would use it.

But they also should contemplate that they would not have anymore right to pass through 114 at such time as the State let the contract for the roadway, which hadn't been done at that time.

So they ultimately gave notice and got a court order requiring them to yield possession of 114. That eliminated his right to pass through 114, that access to the highway.

And the question has come up as to whether or not he would have any access outside of his property, and this has been discussed by the appraisers.

Now, it is the law of Florida, as has been argued -- There is a law creating a statutory way of necessity, which is that when somebody gets landlocked and they have no access to any roadway, a way of necessity is created if they are using the property for residence purposes, stockraising or agriculture or timber.

The uses are indicated in the statute, and I will read you the statute.

This is Section 2 of Florida Statute 704.01. It states:

"Statutory way of necessity exclusive of common law right.

"Based on public policy, convenience and necessity, a statutory way of neces-

sity exclusive of any common law right exists when any land or portion thereof outside any municipality which is being used or desired to be used as a dwelling or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road.

"The owner or tenant thereof or anyone in their behalf lawfully may use and maintain an easement for persons, vehicles, stock and electricity and telephone service over and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof; provided, that such easement shall be used only in an orderly and proper manner."

In other words, if he is cut off, as this person is cut off from U.S. 27 and 84 through 114, by reason of the prior Court orders, the Court orders which I have explained to you, he then has a statutory right of way to go through private lands, but this should not be applied to give him a right of way through 114 which is the right of way that had been taken away from him - through private lands, by the nearest practicable route, to whatever roadway would be available.

And it should be recognized that a person in a situation where it looks like he is cut off has this right of Statutory necessity. And there is a further provision in the statute where a reasonable price shall be paid for his right under certain court proceedings, which you don't need to consider now.

But he has a right to establish a right of way through the nearest available road, by the most practicable route, and you should consider that in your valuing of the property in the condition that you find it to have been in at the time of the order of taking.

APPENDIX I

Excerpts from Transcript showing denial of income approach to valuation of adjoining property to be used as comparable property for showing value to the property in question.

Q. What was the purpose of your appraisal?

A. The purpose of the appraisal was to find out what was the fair market value of the subject property as of the order of taking which was May 19, 1977.

Q. What documents did you review?

A. I have the county tax rolls in my office. I also reviewed the maps and the data attached to the appraisal made by Mr. West of Parcel 114, under date of January 19, 1967, the appraisal made by Mr. Gallion for the State preparatory to the issuing of the order of taking in May of 1977 and maps attached thereto, and all the data supporting his appraisal which was dated the 4th day of Octob er, 1976.

Q. Did you check the zoning maps?

A. Yes.

Q. What was your next step after you checked all the documents?

A. I was very much concerned after reading the appraisal report --

Q. Whose appraisal report are you talking about?

A. Mr. Gallion's. (Continuing) To find that he had used as comparable sales not business properties but just raw acreage, which there is no comparison whatsoever.

Here is a man who had started in business, and the State has come along and ordered the taking of that first parcel which included his buildings. And yet, the order said that he could stay there and continue

to operate with access of light, air and so forth, ingress and egress.

And at that time, he knew that he was through, that his business had ended right then and there, and he would have to move it back onto the subject parcel, Parcel 101, to the rear or to theeast.

An examination of the income reports showed --

MR. ANDERSON: Objection, Your Honor.

THE COURT: The objection is sustained. If you are proposing to testify as to any income from Parcel 114, the objection is sustained.

MR. ROSENBERG: I would ask that we be allowed to proffer it, at any rate, Judge. Woudl you prefer that we proffer it later?

THE COURT: I will give you time to proffer it at some convenient time.

MR. ROSENBERG: Thank you, Judge.

* * *

Q. Mr. Slater, if I were to tell you that limited access means that there is no right of going in and out, would that alter your appraisal of this business property?

A. Absolutely no right?

MR. ROSENBERG: I am going to object, Your Honor. There has been no testimony that in 1977 there was no right. It is misleading.

THE COURT: The objection is overruled. His question concerned limited access,

whether if there is limited access, there is no right to go across the property to reach the highway.

The limited access provision, though, did not come into play until such time as the State should decide to make their improvement.

MR. ROSENBERG: That was in 1980 when they started their improvement. We are talking about May of 1977.

THE COURT: But his question was, did he understand what limited access meant, and he said that he thought it meant that you could cross the property at certain spots. And the attorney asked him that if he presumed he could not cross the property at all or had no right to cross the property, would it make a difference in his valuation.

MR. ROSENBERG: However, Judge, it is a misleading question. There has been no testimony -- The same person is the occupant-owner. It is the same people. Is he saying that Mr. Tsanos is going to say that you can't cross my property?

THE COURT: No. The State has a right to say that they can't go through 114 to reach the highway, which is the case as soon as they commence the improvement.

MR. ROSENBERG: There has been no testimony by the State that such occurred or that such was actual state of affairs.

THE COURT: He may speculate on how long it would be before the limited access provision would become applicable. but he may not presume that under limited access he would still have a right ot cross the

property.

You may proceed.

* * *

THE COURT: I understand you are going to proffer testimony as to the income from the Andytown business on 114.

If it is in the report, why don't you proffer the conclusions in his report; that you would put on evidence to support that. If I am wrong in this ruling, all you have got to show is that it would be proper to receive that testimony, since I did not allow you to capitalize the income on the other property.

State into the record what you would proffer, if permitted, by this witness.

MR. ROSENBERG: All right.

"In the final analysis, the income approach is the only true valuation estimate as the subject property is extremely unique, as previously pointed out in this appraisal and, therefore, I have selected the capitalization approach as the final estimate of value.

"The owner was completely wiped out from a going business, but the Court will have to decide what damages resulted from this taking, as it will be difficult to replace a similar situation under the present conditions. He always maintained a hope that he could fill in the other 25 percent of unused land and rebuild his business with ingress and egress to State Road 25 and State Road 84.

"It has been confirmed" -- Strike that.

"Having examined the tax returns for the years, 1975, '76, '77 and '78 for Konstantine Tsanos, with separate appraisal for the operation of the property at Andytown, I found the average net income to be approximately $80,000.00."

You will note, Your Honor, that you had prevented Mr. Tsanos from testifying to that.

THE COURT: That is correct.

MR. ROSENBERG: We would proffer his testimony that that would have been it, $80,000.00 average net income.

"All expenses were listed with the exception of the cost of management which I appraise at 25 percent of his net income, namely, $20,000.00, leaving a true net income of $60,000.00 upon which to base a valuation.

"Assuming a prudent buyer in May of 1977, who wished to invest in this property with a planned holding period of ten years, desiring a 14 percent return on his cash equity, he would desire the following: Market shows he could obtain a 70 percent loan on this going business, at an interest rate of eight percent per annum, payable monthly. He expects a 20 percent increase in value over the ten-year period. The rate would be .095846. Net income, divided by rate, equals valuation."

MR. ANDERSON: Excuse me. Your Honor, I am going to make a phone call and try to get Mr. Gallion here. I am going to use him as a rebuttal witness. I am

going to leave the courtroom for just a minute.

THE COURT: You had better listen to this.

MR. ANDERSON: I have read the appraisal. He is reading from that. Your Honor.

MR. ROSENBERG: That $60,000.00, divided by .095846, would result in a $626,004.00 valuation.

"This is obtained from Irv Johnson's mortgage equity tables."

And then you just do it this way:

"Fair market value, via income approach, $600,000.00.

"In the final analysis, the income approach is the only true valuation estimate as the subject property is extremely unique and, therefore, I have" -- Strike that.

Thank you, Your Honor.

THE COURT: The proffered testimony will be excluded by reason of the Court's finding that the method used by the appraiser was a capitalization of the profits being derived from the business, which at the time of taking was being operated on Parcel 114, which had previously been condemned by the State and was at that time owned by the State of Florida and being operated by the defendant under a rental arrangement with the State of Florida based on the 1967 taking stipulation.

APPENDIX J

Excerpts from Transcript showing

(1) 1977 taking was for same project proposed in 1967 but expanded.

(2) That access was present in 1977.

(3) That project in 1967 would not take away access through adjoining properties.

(4) Objections in that 1967 Stipulation was breached by taking away the present property.

THE COURT: I think you can show the reasonable access until the county or the state of whoever was building the road decided to proceed with construction and let the jury decide what it was worth. You can't contend that you have got permanent access.

MR. ALEXAS: We don't contend that we have permanent access. However, they did scrap their plans.

THE COURT: We can let the jury decide what your prospective access was worth.

MR. ALEXAS: I think this is a matter of equity.

MISS GEHL: Your Honor, on the stipulated order of taking, it states clearly that they would take all of the parcel, together with all rights of ingress, egress, light, air and view between the defendant's remaining property and any facility constructed on the above-described property.

There was no facility constructed on that property on May 19, 1977, so as of the date of taking we had complete ingress and egress. That is our point.

THE COURT: But they cut it off.

MR. ALEXAS: They are taking the property without paying for it.

THE COURT: You are not using that piece of property anymore, the one they took.

MISS GEHL: That is right.

MR. ROSENBERG: Your Honor, it was

used for a period of time after the taking in May of 1977.

THE COURT: I don't think that could be within the contemplation of the jury. The jury could value the property as having a right of access for however long it should reasonably be anticipated that it could be used. But that would be what a willing buyer and a willing seller and so forth would negotiate it on if they tried to sell the property as of that date.

This property was subject to having the access cut off, at the whim of the Department, when they decided to go ahead with their construction.

MISS GEHL: But it does not make our parcel landlocked, Your Honor, as a matter of law.

THE COURT: It is subject to being landlocked at any time.

* * *

THE COURT: Was this under a common ownership in the original --

MR. ALEXAS: It was the same people.

THE COURT: Who owned it?

MR. ALEXAS: In 1967, Andrew D. Poulos.

THE COURT: Did he own both of these parcels?

MR. ALEXAS: It was one parcel.

THE COURT: In that case, he waived his right to business damages.

MR. ALEXAS: Provided he could keep the back property, Your Honor.

What we are claiming here is, we should be entitled to use the front property as comparable property because the same business could be put on the second one. We are trying to appraise the value of 101, considering the best possible use or one of the uses - it may not be the best use, but at least one of the uses that it could be used for, this particular business.

And it is so comparable. It is right next door.

THE COURT: I don't know how you could use it for a business if you weren't going to have access but for a couple of years.

MR. ALEXAS: Well, it doesn't say that. It says that after they have built on there, if it blocks them through any structure they may build. It doesn't say that they are going to build and block it completely.

THE COURT: It says that they are going to have limited access to these highways.

MR. ALEXAS: Here are the plans. I don't see any limited access.

THE COURT: I will rule that no business damage --

MR. ALEXAS: We can appraise the proper-

ty with respect to its best possible use, Your Honor.

THE COURT: If he can convince the jury that anybody would put a business on the property that you had no more assurance of access to the highway than what they had.

MR. ALEXAS: The access to 27 and the access to 84 wasn't supposed to be blocked. Only the access to the interstate which was supposed to be put here. Only the access to the interstate, as it existed in 1977, which is under the old plans that they scrapped.

They actually nullified these plans. That is what I am trying to say. They nullified them. Therefore, it nullifies any interchange being built as of the order of '67.

THE COURT: What access would you have had in 1977 after they let the contract that was in contemplation at that time?

MR. ALEXAS: They did not let it. They scrapped it.

THE COURT: Whether they scrapped it or not, on the date of taking, that is what was contemplated, wasn't it?

MR. ALEXAS: On the '77 taking, no, sir. A new plan was contemplated in the 1977 taking.

THE COURT: What was the plan that was contemplated then?

MISS GEHL: It is a big cloverleaf intersection, Your Honor.

MR. ALEXAS: It was completely different from this. This is the '67 evidence. The '77 plan is conpletely different.

THE COURT: What access did you have before that you lost by this taking?

MR. ALEXAS: We had access to 84 and access to 27 plus access -- This little piece here is part of 101. This is what was taken in 1967. We had access there and, not only that, they scrapped the plans that gave them full access to --

THE COURT: There is no business on this property. How can you claim business damages?

MR. ALEXAS: On which one?

THE COURT: On the property now.

MR. ALEXAS: The order says that they could continue the business on both properties until they built.

MR. ANDERSON: Your Honor, the business was gone as of 1977.

MR. ALEXAS: No. it wasn't.

MR. ANDERSON: The business was allowed to remain in use until 1977.

THE COURT: The predecessor in title has waived his right to any business damages.

MR. ALEXAS: Only under the premise that he could keep the back property, but they took the back property away. So I think that waiver should be nullified as a matter of equity.

THE COURT: I will rule that no business

damages will be allowed except for any prospects of using this property for a business, which you can testify to.

* * *

MR. ALEXAS: Let me show you this little map. Your Honor, this is what they propose today.

THE COURT: Is this the subject property?

MR. ALEXAS: Evidently, yes, sir. These are the overhead ramps. Here is 27. It will continue to exist. And 84 has been moved from along here. It has been moved this way.

THE COURT: How are you going to get to this property?

MR. ALEXAS: Right today, it is obstructed because they took it for this purpose. You can walk to the property right now. These are the overhead ramps.

THE COURT: When the roads are built, will there be any access at all?

MR. ANDERSON: When the construction is completed, there isn't going to be any property owned by Mr. Tsanos.

MR. ALEXAS: Your Honor, we are talking about 1977. You have to appraise the property as it was in '77, and it had access in '77.

APPENDIX K

Final Judgment dated Oct. 1, 1968

on the 1967 condemnation.

IN THE CIRCUIT COURT
OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN
AND FOR BROWARD
COUNTY, FLORIDA

No. 67-848 -"J" Warren

BROWARD COUNTY, a
political subdivision
of the State of Florida

Petitioner,

vs.

ROY C. JONES, et al.,

Defendants.

FINAL
JUDGMENT

THIS CAUSE came on for trial and the Jury, having been empaneled and sworn to try what compensation shall be made to the Defendants for the property rights appropriated, and having heard the evidence and charges of the Court, and having retired to consider its verdict, returned the following Verdict:

IN THE CIRCUIT COURT
OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN
AND FOR BROWARD
COUNTY, FLORIDA

No. 67-848 "J" Warren

BROWARD COUNTY, a
political subdivision
of the State of Florida

Petitioner,

vs.

ROY C. JONES, et al.,

Defendants.

FINAL
JUDGMENT

We, the Jury, find for the Petitioner, as follows:

FIRST: That an accurate description of the property taken herein is the following.

PARCEL NO. 101.1-R * * * (not applicable)

PARCEL NO. 114.1-R

That part of the NW¼ of NW ¼ of NW ¼, W ½ of the NE ¼ of NW ¼ of NW ¼ and N ½ of SW ¼ of NW ¼ of NW ¼, Section 14, Township 49 South, Range 39 East, South of State Road 84 and East of State Road 25.

Lying Westerly, Northwesterly, and Northerly of the following described line: Commence at the Northwest corner of said Section 34 thence run East along the North line of Section 34 a distance of 206.04 feet, thence South 13°22'30" East along the survey line of State Road 25 a dis-

tance of 1458.34 feet, thence North 76° 37'30" East 100 feet to the Point of Beginning of said line herein described, then North 4°22'30" West 934.58 feet, thence North 51°21'52" East 161.89 feet, thence South 77°15'56" East 400 feet to the end of said line herein desceibed.

Containing 3.31 acres, more or less.

PARCEL NO. 116.1 * * * (not applicable)

SECOND: That the compensation to be made by the Petitioner for the above-described parcels of land is as follows:

For No. 101.1-R, described above, owned by Paul L. Davis and Dorothy R. Davis; we find the compensation to be made therefor is the sum of: $85,000.00 .

For No. 114.1-R, described above, owned by Andrew D. Poulos; we find the compensation to be made therefor is the sum of: $185,000.00 .

For No. 116.1, described above, owned by Paul L. Davis and Dorothy R. Davis; we find the compensation to be made therefor is the sum of: $20,000.00 .

So say we all, this 1st day of October , A.D., 1969, at Fort Lauderdale, Broward County, Florida.

/s/ Fred W. Burns
FOREMAN

IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that title to the property

described above, which vested in the Petitioner pursuant to the Order of Taking and deposit of money heretofore made, is approved, ratified, and confirmed, and it is further

CONSIDERED, ORDERED AND ADJUDGED that the Clerk of the above-styled Court is hereby ordered and directed to pay from the funds deposited in the Registry of the Court by the Petitioner, the sums so stated above to the aforementioned Defendants, less any sums heretofore withdrawn, if any.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 9th day of October, 1969.

Lamar Warren
CIRCUIT JUDGE

STATE OF FLORIDA - BROWARD COUNTY
This instrument filed for record
OCTOBER 10, 1969
and recorded MINUTES OF CIRCUIT COURT
179 page 526 Record Verified

JACK WHEELER, Clerk

By _____D.C.

- Req. Ct. Ck. #2366-10/29/69-$50,225. Paul L. Davis & Dorothy R. Davis Balance of award
- Req. Ct. Ck. #2367-10/29/69-$92,000. Andrew D. Poulos - Balance of Award
- Req. Ct. Ck. #2368-10/29/69-$6,650. Paul L. Davis & Dorothy R. Davis Balance of Award

APPENDIX L

Motion to terminate possession of Parcel 114.1-R served in 1977.

IN THE 17TH JUDICIAL
CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL ACTION NO: 67-848
JUDGE: WARREN

BROWARD COUNTY, A
POLITICAL SUBDIVISION
OF THE STATE OF FLORIDA,
Petitioner,

vs

PARCEL
NO. 114

ROY C. JONES, et al.,
Defendants.
_____/

MOTION TO TERMINATE POSSESSION AND NOTICE OF HEARING ON THAT MOTION

COME NOW BROWARD COUNTY and DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (D.O.T.), who move for an Order terminating the possession, as to Parcel 114 in this action, now being exercised by KONSTANTINE TSANOS and others.

1. KONSTANTINE TSANOS is successor in interest to ANDREW D. POULOS, now deceased, as to Parcel 114.

2. Parcel 114 in this action is contiguous to land designated as Parcel 101

in a new eminent domain act styled DIVISION OF ADMINISTRATION STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION vs. KONSTANTINE TSANOS, Broward Co. No. 77-3362. Parcel 101 in the Tsanos suite is the remainder parcel as to which damages were paid for severing Parcel 114 in the (instant) Jones suit, pursuant to a Stipulated Final Judgment signed September 6, 1967 by this Court.

3. Mr. TSANOS, individually and/or through his attorney, was furnished written notice on or about July 21, 1967, that he would be required to vacate Parcel 114 within a reasonable time but not sooner than 90 days thereafter.

4. On or about October 24, 1976 Mr. TSANOS was so notified as to Parcel 101.

5. On or about April 14, 1977, Mr. TSANOS was notified in a like manner to

vacate within 30 days as to Parcel 114.

6. On or about, but not sooner than, the date of deposit in the Tsanos suit, Mr. TSANOS will receive in a like manner a notice to vacate Parcel 101 within 30 days.

7. Parcel 101 currently is vacant, and landlocked, and therefore not suitable as a site on which to continue the activities being conducted on Parcel 114.

8. On or about April 4, 1977, a contract was let by DOT to begin construction forthwith on U.S. 27, from a point from one mile south of the intersection at State Road 84 to a point two miles north of said intersection, necessarily involving Parcels 114 and 101.

9. On or about March 21, 1977, a contract was let by DOT to begin construction on S.R. 84, to begin at said intersection to widen said road, also involving Parcels 101 and 114.

10. Therefore, the condition of the September 6, 1967 Order, that ANDREW D. POULOS and his successors be allowed to remain in possession of Parcel 114 until construction begins on the improvements at that intersection and involving that land, has been fulfilled, and the COUNTY OF BROWARD and STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION are entitled to have possession terminated as to the former owners and successors of Parcel 114.

11. Since continued possession will put the State to great expense, inter alia in terms of additional contract costs, and since Mr. TSANOS has had nearly a year's warning that he would actually be required to vacate the premises, termination forthwith of the privilege of possession is hereby sought.

WHEREFORE, Movants pray for an Order forthwith terminating possession and

occupancy of Parcel 114 by the former owners, and successors in interest to the former owners, ANDREW D. POULOS et al., and KONSTANTINE TSANOS, et al., respectively.

JAY H. BECKERMAN, Attorney
District 4 Legal Office
State of Florida Department
of Transportation
780 S.W. 24th Street
Ft. Lauderdale, Florida 33315

Office of General Counsel
Broward County
201 S.E. 6th Street
Ft. Lauderdale, Florida 33301

I HEREBY CERTIFY that a copy of the foregoing Motion to Terminate Possession and Notice of Hearing on That Motion has been furnished today, April _____, 1977, to William P. Doyle, Esq., Attorney for Konstantine Tsanos, 2440 E. Commercial Blvd., Ft. Lauderdale, Florida 33308, who is hereby notified that the Movants shall call up this Motion for hearing before the Honorable Lamar Warren, Judge of

the above styled Court, in Chambers at the Broward County Courthouse, Ft.Lauderdale, Florida, at 3:15 p.m., May 5, 1977, or as soon thereafter as the matter can be heard.

JAY H. BECKERMAN, Attorney

APPENDIX M

Order dated Dec. 1, 1977 terminating possession of Parcel 114.1-R on June 1, 1979.

IN THE CIRCUIT COURT
17TH JUDICIAL CIRCUIT,
BROWARD COUNTY, FLORIDA

CIVIL ACTION NO. 67-848
Judge Warren

BROWARD COUNTY, a
Political Subdivision
of the State of Florida,
Petitioner,

vs. ORDER

ROY C. JONES, et.al.,
Defendants. /

Upon State of Florida Department of Transportation's Motion to Modify the 1967 Stipulation Agreement after hearing testimony from Petitioner and Defendants:

IT IS ORDERED AND ADJUDGED after hearing testimony that the Petitioner plnas to let the contract for the Interchange at State Road 25 and Road 84 on July 1979.

IT IS HEREBY ORDERED that the Defendants remove themselves and vacate the

property known as Parcel 114 at the South East Corner of State Road 25 and Road 84 on or before the 1st of June 1979.

This does hereby Modify the Stipulated Order of September 6, 1967.

DONE AND ORDERED this 1st day of December 1977.

Lamar Warren
HONORABLE JUDGE LAMAR WARREN

APPENDIX N

Final Order dated July 3, 1979 terminating possession of Parcel 114.1-R on Sept. 1, 1979.

IN THE CIRCUIT COURT,
17TH JUDICIAL CIRCUIT,
BROWARD COUNTY, FLORIDA

BROWARD COUNTY, a
Political Subdivision
of the State of Florida,
Petitioner,

vs. PARCEL 114

ROY C. JONES, et al.,
Defendants.

ORDER

Defendants' motion to vacate orders of May 5, 1977 and December 1, 1977 are denied. Order terminating possession and Orders of May 5, 1977, and December 1, 1977, are modified to provide as follows:

1. Defendants will vacate premises and terminate all possession, right, title and interest to Parcel Number 114 on or before September 1, 1979, upon presentation of "good faith" affidavit as more particularly set forth hereinbelow.

2. That Department of Transportation,

as successor in interest to Broward County, will fine a "good faith" affidavit indicating that Parcel Number 114 will be utilized for limited access interchange at U. S. Number 27 and I-75 before September 1, 1979.

3. That Department of Transportation in good faith represents that a contract for the purposes enunciated in Paragraph 2 hereinabove, which will require the use of all or part of Parcel 114, is contemplated and is anticipated being awarded or let on or before December 31, 1979.

4. That counsel for Defendants Konstantine and Litsa Tsanos, successors in interest to Andrew D. Poulos, authorize their interest to have been represented by Abraham Rosenberg and Ernest Alexas.

5. That in the event a construction contract is not let or awarded on or before December 31, 1979, Konstantine Tsanos and Litsa Tsanos may pursue all

legal and equitable remedies and damages with regard to their possessory interest in Parcel 114 for any loss due to premature taking of possession.

6. Motion to consolidate with Case No. 77- 3362 is denied.

7. Plaintiff's, Department of Transportation's motion to strike Defendants' answer, counterclaim and petition is granted as to Case Number 67-848.

8. This Court retains jurisdiction to enforce this Order.

DONE AND ORDERED in Chambers at the Broward County Courthouse, Fort Lauderdale, Florida, on this 3 day of July, 1979.

MIETTE K. BURNSTEIN
CIRCUIT JUDGE

APPENDIX O

Excerpts from Transcript shown scope of project in 1967, then in 1977, use of fronting Parcel 114.1-R until 1979 and Trial Court's denial of considering access through Parcel 114.1-R. Objections and Arguments on contract obligations of 1967 condemnation if valued without access.

MR. ALEXAS: Your Honor, the business ceased operation, I believe, in August, 1979. Mr. Tsanos can verify that.

There is a question here. We are not pleading for business damages as such. I am going to offer the whole 1967 case into evidence. I have it here. And there is a very important equitable question that arises here.

The appraiser for the Department of Transportation -- It was the State Road Department at that time. But the Department of Transportation appraiser claims in his appraisal report that the land was legally landlocked. And I question that definition because the land was neither legally nor actually landlocked as of the date of taking of this parcel, Parcel 101, which was May 19th of 1977.

And that question should be dispensed with before trial. I don't think we are ready for trial unless we dispense with that question. I would like to argue that point..

MR. ANDERSON: Your Honor, I think we can address that question right now, if it is all right with you.

THE COURT: I am willing to decide it.

MR. ANDERSON: Your Honor, in 1967, there was a case styled: Broward County versus Roy C. Jones. Broward County was doing condemnation work for the lorida Department of Transportation at that time. And this was for, in the Broward County action, Parcel 114.1-R.

In that parcel, Your Honor, the entire business establishment of Andytown was

taken by Broward County, and there was a stipulated order of taking.

Everybody realized that construction was not going to begin at any time in the near future at that interchange. So in exchange for allowing Andytown to continue in operation as a business up until the time of construction, Andytown agreed to waive the business damage claim in any lawsuit involving a condemnation of that parcel.

The stipulated order of taking also, Your Honor, at page three, clearly demarked that it was a limited access right of way taking which meant that the remainder did not have access, light, air and view, and it was pursuant to a limited access taking.

Legally, Your Honor, we contend that that means --

THE COURT: Does somebody have a map, so they can show me how these parcels are situated?

MR. ANDERSON: Yes, sir.

MR. ALEXAS: We all have a map, Your Honor.

MR. ANDERSON: Your Honor, this yellow area was Parcel 114. Parcel 114 was the parcel that was taken by the Department of by Broward County in the action of Broward County versus Roy C. Jones..

As you can see by the outline, that is where the --

THE COURT: That is where the business was?

MR. ANDERSON: Yes, sir. Now, we have a vacant piece of property in the back which is Parcel 101 which is deprived of access to State Road 84.

MR. ROSENBERG: They were one parcel to begin with. You agree to that, don't you?

MR. ALEXAS: Your Honor, I would like you to read the whole stipulated order of taking.

Your Honor, here is the map that was in evidence in the other case. That shows it better.

THE COURT: If this is the parcel that was taken in the other case and this is the parcel we are dealing with now, 114. 1-R became 101?

MR. ANDERSON: That is incorrect, Your Honor. The yellow part was taken in 1967. Parcel 101 is what we are dealing with today.

THE COURT: The white portion inside the red line is Parcel 101?

MR. ANDERSON: Yes, sir. As you can see, Your Honor, it is a limited access taking.

THE COURT: I see that there was a stipulation in that order that they could continue to use it until a contract was let.

MR. ROSENBERG: That is right, Your Honor.

THE COURT: Has the contract been let?

MR. ROSENBERG: About two years after the taking, after the second taking, Judge, in 1979, the contract was let.

MISS GEHL: The first taking was Parcel 114, Your Honor. The title to Parcel 114 was taken by the State in 1967, but possession was left with the Tsanos.

THE COURT: Then the contract was let?

MISS GEHL: Then this parcel was taken in 1977, ten years later. The contract was let two years later, in 1979. That is when the Andytown property --

THE COURT: So your situation was that you had access until whatever time they decided they were going to take the property?

MR. ALEXAS: That is right. The actual taking.

THE COURT: You are saying that the valuation would be based on the property that had access only until the State decided to go ahead?

MR. ALEXAS: That is correct, Your Honor.

I also contend that the stipulated order of taking was an agreement, and it wasn't a true taking in a sense, the way the State condemnation takings are. A taking means a taking of possession. In other words, possession was deferred. And Judge Warren signed an order after

the taking of Parcel 101. It was signed afterwards.

And he said that the contract --

THE COURT: Did this order provide that you pay rent for that parcel?

MR. ALEXAS: Yes, sir. That was stipulated in that order.

THE COURT: It was a taking. It was a tenancy until the road contract was let.

MR. ALEXAS: Yes, sir.

THE COURT: How can you say it wasn't a taking?

MR. ALEXAS: Because possession was not taken. That is my contention.

However, the State Road Department did change its plans. The order of taking in 1967 provided and it was stipulated that the back parcel would remain. The back parcel did not. They changed their plans in 1977 and decided they needed it all.

Then they went and took Parcel 101 and left them in possession -- Judge Warren signed an order, stating that they could retain possession until June the 15th, 1979. Actually, they gave up possession around August. It was very close.

THE COURT: Well, I don't see what the question is.

MISS GEHL: The point is, this parcel was not landlocked.

THE COURT: It wasn't landlocked, but it was subject to being landlocked as soon as they went ahead --

MR. ALEXAS: Not necessarily, because the order says it can only be landlocked -- Your Honor, first, these are public highways, State Road 84 and U.S. 27.

THE COURT: Is there no other access to this land through the back?

MR. ALEXAS: By the Arvida Properties, through the back, there would be possible access.

But what we maintain is, there was actual access through to these public highways. The purpose of the taking is to extend Alligator Alley and build an interchange, and it states in the order an interchange for a limited access highway such as an interstate.

And then even after it was taken, that they could still have access from here provided it wasn't obstructed through the limited access highway.

What we are concerned with is access to the public highways, not the limited access ones. Everybody has a right of access if he fronts the highway.

And all they did was to bring the right of way from here back to here. Even though it may say limited access, it wasn't. It says here that without limitation of access, he can have possession.

THE COURT: Are they going to put up a fence?

MR. ALEXAS: They might not put up a fence.

MR. ROSENBERG: There were no plans at the time of the taking in May, 1977.

MR. ANDERSON: Your Honor, the intersection is built now.

THE COURT: Where will the fence be? Will the fence cut off this access?

MR. ROSENBERG: There were no plans in effect. The original plans of 1967 were scrapped.

MR. ANDERSON: Your Honor, in 1967, there were plans for a limited access diamond interchange at the intersection of 84 and 27. Subsequent to 1967, Your Honor, it was decided that Interstate 75 was going to run from Naples to Fort Lauderdale, and a new interchange had to be designed and that interchange was going to become a cloverleaf rather than a diamond interchange.

Even in 1976, as the stipulated order of taking indicates, limited access was taken which meant that the remainder did not have access, at least to 84 or to 27, at the northern end western boundaries.

THE COURT: How about access to the other road?

MR. ANDERSON: There is no other road out there, Your Honor. It is my understanding that there is no other road out there except 27 and 84.

MR. ALEXAS: We are talking about the plans as they were in 1977, May 19, 1977, and they had full access.

MR. ROSENBERG: There were no plans, Judge. They had scrapped them. That is why they kept coming back and forth to court.

THE COURT: Will this be a limited access highway?

MR. ANDERSON: This is an interchange for Interstate 75, Your Honor. There is going to be no access. There was no access anticipated in 1967.

THE COURT: Did they have access through some other route?

MR. ANDERSON: We have not been able to determine any other route. If they did have access through Arvida, if the defendants can show there was a route -- They did not have ingress and egress to State Road 84 or U.S. 27.

MR. ALEXAS: Your Honor, we have to consider Parcel 101 as it was, not according to the plans they were going to use after they took it. We have to consider it as it was on May 19, 1977 and, as it was, it was not obstructed. It wasn't supposed to be obstructed.

And not only that, they scrapped the plans for obstructing it.

THE COURT: I will rule that you have no access. It appears to me that the agreement said that you should have a tenance at 750 a year which has been terminated, so you don't have any access.

MR. ALEXAS: Not until 1979. As of our date of taking of Parcel 101, which was May 19, 1977, we had full access.

* * * *

THE COURT: I am going to persist in my ruling that you can't put the evidence in of what that operation has been producing to establish the value of this property.

MR. ALEXAS: No, Your Honor. Only to establish comparable properties. Your Honor, this is the only comparable property, that business.

THE COURT: The appraiser can estimate what the property would be worth if somebody would buy it for putting any type of a business on it, if it would be practical to do it through another entranceway.

MR. ROSENBERG: Judge, he would have to have something to base it on in the capitalization method.

THE COURT: He can't base it on what any particular business is making which is not the subject.

MR. ROSENBERG: Why not, if this business were moved back here on the same actual parcel?

Judge, it is a very similar situation to the cemetery case that you had before.

THE COURT: If you are condemning a piece of property that is out here on the Galt Ocean Mile and you thought it was suitable for building a condominium apartment building like this building, you couldn't put on evidence as to what some other condominium apartment was making. It just would not be material.

You could put on evidence as to what a willing purchaser would pay for a piece of property that could be put to that use.

MR. ROSENBERG: He would have to have something to base it on if he is using the capitalization method, Judge.

THE COURT: I don't see how he can use the capitalization method from a non-producing piece of property.

MR. ROSENBERG: But Judge, he had the same piece of property. It is really one tract of land. It is just moving it back. It isn't that they are moving from here down to Griffin Road.

MR. ALEXAS: Your Honor, the order of taking in Parcel 114 says that they can operate it as one tract.

THE COURT: There is no way they can operate it when the State owns it. They could operate it until the State took it. I have been letting in testimony as to the value of the property because - I mean considering the fact that they would have a right to use it for some indefinite period until the State decided to take it, which actually they began, apparently, trying to get possession of it at the time.

So what a purchaser would pay for the use of this property for that indefinite period, I think, is a pertinent issue. But if you are going to value this property, you can't do it on the basis of what income was being produced from the business being operated on the adjacent property.

MR. ROSENBERG: Why not? Isn't this a special use type of property? The other appraiser said that it was unique.

THE COURT: It is not a special use type of property.

MR. ROSENBERG: There is none other like it.

THE COURT: There are properties all over the place at intersections.

MR. ROSENBERG: But none that have the influence of these two roads which are major arteries.

THE COURT: There are hundreds of intersections up and down the highway, not of these two roads.

MR. ROSENBERG: That is why I had asked for a pre-trial conference because at a pre-trial conference, we could have ironed this out.

And if you don't allow our appraiser to put forth the capitalization method, which is basically the way he has arrived at the appraisal --

THE COURT: You may not be able to put on proof. You can't put on proof by a method that is not acceptable for this property.

MR. ALEXAS: Your Honor, may I submit another concept to this thing?

The original project was taken to build a limited access interchange. That was not done until there was a change in plans, as the engineer testified. Either the old plans were completely scrapped in favor of new plans, or they were substantially changed for the new project.

Regardless of how you look at it, both parcels were taken for the same purpose. And you cannot use the purpose of taking

as a concept of valuation. We have to consider that there was free access.

I think we should be entitled to submit testimony to show that it was operated as a parent tract and that this business is comparable property, if we consider that it was completely taken or it is considered as one because it wasn't taken, the actual taking of possession, until 1979.

They took possession of this in 1977, and this came afterwards. But the project was the same project and before the project began, there was full access from both parcels.

THE COURT: They bought the access in the other proceedings, so you don't have any access through the other parcel, that is, once they let the contract.

MR. ALEXAS: No, Judge, it does not say that. It says only access through a facility to be built. I submit that a fence is not a facility. And neither did they build a fence.

THE COURT: When they pay for a limited access, you don't have the right to pass through that property to get to the highway.

MR. ALEXAS: Wasn't that taken under a false premise?

THE COURT: I don't know whether it was or not. We are not trying that case.

MR. ALEXAS: But you are barring the testimony on the basis of that case. It was taken on a misunderstanding of the facts. It was mutually agreed, by both the State and the defendants here, that

this would be taken and this would be left alone.

THE COURT: Your contention is that the change in the plans for the roadway might invalidate the taking? I am not going to get into that in this case.

MR. ALEXAS: I think that this should be valued as if it had full access because it is the same taking that carried over.

THE COURT: Counsel, you can put on evidence as to what a property might be worth, at an important intersection, where you have an entrance of whatever distance down the road you show an entrance would be to this property. You can't value the Andytown business as a criteria for determining the value of this property.

MR. ALEXAS: Can he generally value a business that could be put on this property?

THE COURT: He can testify to what a buyer who wished to put a business on it would pay for a piece of property like this if he had access, if you can prove he would have.

MR. ALEXAS: Your Honor, I submit that at the time of the taking -- And the project that was to be put on there should have no bearing on the value as far as access because the road right of way was only brought to here.

We had full access.

THE COURT: He had access through the other parcel only until the State decided to take it. Any additional value, if he had a right to claim it because the State had not taken it at the time of this taking

it was an indefinite time, and I doubt that you can show any purpose under those doubtful conditions.

MISS GEHL: Arvida wanted to buy it, Your Honor. He wouldn't sell it because he wanted to move his business back there.

THE COURT: If they had bought it, he wouldn't have it.

MR. ALEXAS: I submit that an offer to buy has probative value, but an offer to sell does not.

THE COURT: That is not what the holdings are, Counsel. The holdings are that offers are not permissible in the determination of value. I think sometimes they have some probative value, too, but that is the Florida law.

MR. ALEXAS: I think there might be a misconception here. The limited access interchange was not to make these highways limited, 84 and 27, but only Alligator Alley and the interchange itself, which was supposed to go on here.

So that the access was brought from here, where it used to be -- This was the right of way line as it existed. Even though the paved road was here, people used to park all over the place here.

Then the right of way line was brought to here, and we were right on the right of way of both 27 and 84 directly, from 101.

THE COURT: You would have to show proof that he would have had access to a highway without going through the previously purchased parcel or could acquire access. I think this could be considered by a buyer

of the property.

But you can't go into how much money is being made by the business that was being operated on the other piece of property.

MR. ALEXAS: May I ask a question? It says in that order of taking of 114 that they are blocking the access from the facility to be built.

It still didn't block the access if none were built, and I don't think any was intended either, through this little strip. Or if it continued to a point here, he could have had access this way or this way. Maybe the facility would be -- We didn't know how the facility was going to be built.

It still left the possibility of access. If they built bridges and ramps, he could go under them for access.

THE COURT: If you can prove there is a possibility of access, not through the other parcel --

MR. ALEXAS: I don't know because this is conjecture.

THE COURT: You have no right of access through the other parcel because the State has purchased that right in the previous proceeding. If you have access through some other sources, you can show it, and that can be considered in valuing the property.

MR. ALEXAS: I don't agree, but if that is the ruling --

* * *

Office-Supreme Court, U.S.
FILED
SEP 23 1983
ALEXANDER L. STEVAS,

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-187

KONSTANTINE TSANOS and
LITSA TSANOS,

Petitioner,

v.

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Respondent.

MEMORANDUM OPPOSING PETITION FOR CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

Respondent, DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, submits the following representations to the Court in opposition to the Petitioners' application for writ of certiorari:

1. The Petitioners have candidly admitted that there were no federal questions specifically raised when this cause was presented at the trial level. (Petition, p. 25) The Petitioners have inaccurately represented that the federal issues were raised upon appeal of the trial court judgment. Attached as Exhibit "A" to this memorandum is a copy of a portion of the Petitioners' brief submitted to the Florida District Court of Appeal. The issues to be resolved must be set out in the table of contents of the brief, per Florida Rule of

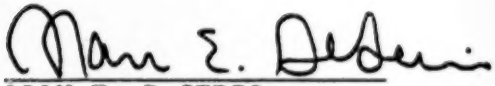
Appellate Procedure 9.210(b)(1). The issues listed by the Petitioners made no reference to any federal question that was to be addressed by the Florida District Court of Appeal. It must therefore be presumed that no federal question was considered or disposed of by the district court when it rendered the per curiam decision without opinion.

2. The Petitioners first made mention of a federal question in its motion for rehearing to the Florida District Court of Appeal. At this point in time it was improper to raise new issues to be considered by the appellate court. Florida Rule of Appellate Procedure 9.330(a), which controls the use of a motion for rehearing, cannot be used to raise new issues which were not previously raised in the appeal proceedings. *Florida First National Bank at Key West v. Fryd Construction Corp.*, 245 So.2d 883, 888

(Fla. 3rd DCA 1971) Since the federal issues were not properly raised in the petition for rehearing, it must be presumed that the federal issues were not considered or disposed of when the court entered its order denying the motion for rehearing.

Since the Petitioners failed to properly raise any federal question in either the trial or appellate court, and there is nothing from which this Court can conclude that a federal question was considered or disposed of, the Respondent respectfully suggests that this Court should deny the petition for writ of certiorari.

Respectfully submitted,



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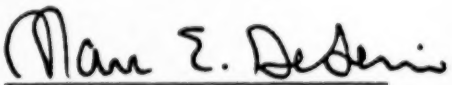
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 19th day of September, 1983, to ERNEST A. ALEXAS, ESQUIRE, 2170 S.E. 17th Street, Suite 302, Ft. Lauderdale, Florida 33316.



ALAN E. DeSERIO

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NO. 82-1223

KONSTANTINE TSANOS and LITSA TSANOS,

Appellants,

vs.

DIVISION OF ADMINISTRATION, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS, KONSTANTINE TSANOS and LITSA TSANOS.

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